(10)

No. 87-1796

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RUTH MASSINGA, *et al.*,

Petitioners,

v.

L. J., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Fourth Circuit

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BRIEF IN OPPOSITION TO THE AMICUS BRIEF OF THE UNITED STATES

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On June 27, 1988 this Court invited the Solicitor General to file a brief expressing the views of the United States. The Solicitor General's Brief, filed in November, 1988, recommends that the Court not grant certiorari on the issues raised directly by the Petition for Writ of Certiorari. He does recommend, however, that the Court grant certiorari on one other issue -- an issue that was never briefed in the district court or court of appeals and arguably is not before this Court.

The Solicitor General in essence agrees with us that the only issues we contend are properly before this Court do not warrant review:

a) The inquiry as to whether petitioners have qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1982), and Anderson v. Creighton, ___ U.S. ____, 107 S.Ct. 3034 (1987), does not warrant plenary review by this Court. It is a "fact-specific" determination, Anderson, ____ U.S. ____, 107

S.Ct. at 3040; the Anderson framework is not one that is causing problems for Courts of Appeals; there is no conflict among the Circuits; the petition does not detail contentions as to how the Court of Appeals erred in making the Anderson determination; and the complaint's allegations withstand qualified immunity scrutiny under Anderson and Harlow (Brief at 9-10).

b) The petitioners' claim that the Social Security Act's foster care provisions do not create rights that may be enforced under Section 1983 also does not warrant plenary review by this Court. A series of cases, including Maine v. Thiboutot, 448 U.S. 1 (1980), Miller v. Youakim, 440 U.S. 125 (1979), and Rosado v. Wyman, 397 U.S. 397 (1970), establishes that Section 1983 encompasses claims of violations by state officials of federal statutes, including the foster care provisions of Title IV of the Social Security Act (the Aid to Families with

Dependent Children title). Brief at 12-13. As the Solicitor General says, apparently "no court has ever suggested that the foster care provisions of the Social Security Act do not create enforceable rights for purposes of Section 1983" (Brief at 13).

Nevertheless, the Solicitor General goes on to suggest that this Court should grant certiorari to decide a third issue: whether the Section 1983 cause of action -- which he agrees is available to enforce rights such as those created by the federal foster care statutes -- should provide a damage remedy in cases involving Spending Clause statutes. Granting such review would violate the usual rule that this Court will not consider issues not raised below; would embroil the Court in an issue as to which there is no conflict in the circuits; and would decide the issue prematurely, depriving the parties and the Court of the benefit of full development of the issue.

1. The issue the Solicitor General wants this Court to review was never raised below. The Solicitor General impliedly criticizes Chief Judge Winter's opinion for the Court of Appeals for saying "in a single, somewhat cryptic sentence" that Section 1983 provides a private right of action for damages (Brief at 10). But the Solicitor General fails to mention the explanation for the Court of Appeals' terseness: the issue he wants reviewed was never raised, briefed or mentioned by the city and state officials in the district court or the Court of Appeals.

In the District Court the petitioners sought partial summary judgment, claiming qualified immunity. They never filed a motion pursuant to F.R.C.P. 12 asserting that damages are not available under Section 1983 for violations of the federal foster care statutes and therefore that respondents failed to state a claim upon which relief could be granted.

In the Court of Appeals, the Brief of the Appellants (Petitioners here) primarily challenged the entry of a preliminary injunction. In the last few pages of their Brief, they turned to their claim that they had good faith immunity against damages under Harlow v. Fitzgerald, 457 U.S. 800 (1982). They asserted that the constitutional rights of the plaintiff children were not clearly established (Brief of Appellants in Court of Appeals at 48-54), and the statutory rights at issue also were not so clearly established as to be enforceable and to "avert the application of Harlow" immunity (Brief of Appellants in Court of Appeals at 54-57). That was the full extent of their appeal. Based on Mitchell v. Forsyth, 472 U.S. 511 (1985), the immunity issue was properly before the Fourth Circuit on interlocutory appeal. But the petitioners never raised in the District Court or in the Court of Appeals the

issue that the Solicitor General is now pressing instead: whether damage relief is per se unavailable in any case of claimed violation of federal Spending Clause legislation brought under Section 1983. Petitioners never even cited the cases the Solicitor discusses here (Brief at 14-17), such as Guardians Association v. Civil Service Commission, 463 U.S. 582 (1983), with the exception of Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), on which Petitioners relied only to argue a very different principle, claiming that the foster care statute is unclear and therefore no enforceable rights at all had been asserted under the rulings in Pennhurst and Middlesex City Sewage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981). The issue raised and language quoted by the Solicitor General from Guardians and Pennhurst were nowhere raised in the Court of Appeals.

From this vantage, the Court of Appeals' "somewhat cryptic sentence" is more understandable. It may be cryptic in the new context the Solicitor constructs around it, but it is more straightforward in the context of the actual issue the Fourth Circuit was asked to and did decide on interlocutory appeal: whether the foster care statute was sufficiently clear to avoid Harlow immunity in an action under Section 1983 for damages. As to this issue, the Fourth Circuit analyzed the foster care statutory claims made by plaintiffs and found that the statutes "spell out a standard of conduct, and as a corollary rights in plaintiffs...[that] are privately enforceable under 42 U.S.C. Section 1983," Appendix to Petition at 22A. The Solicitor General agrees with this proposition.

The Fourth Circuit then added the sentence on which the Solicitor General

focuses but never quotes in its entirety: "Moreover the Supreme Court did not distinguish between prospective equitable relief and an action for money damages in regard to the right to enforce privately in Wright v. Roanoke Redevelopment and Hous. Auth., ___ U.S. ___, 107 S.Ct. 766, 770 n.5, 773 (1987)." (Pet. App. 22a-23a). The Solicitor General has tried to transform this single statement describing factually and correctly a ruling of this Court into something it was not. In the context of the issues before the Court of Appeals, the sentence may have been meant as a gloss on the finding that the rights were sufficiently clear to be enforced through Section 1983, overcoming defendants' objections -- whether based on Pennhurst as to any relief or Harlow as to damages -- that they were not clear enough.

If the sentence is read instead, as suggested by the Solicitor General now, as a statement on the Section 1983/Spending Clause issue, then it was arguably dictum, since the Spending Clause question was not raised and certainly did not need to be decided to resolve the issues that were before the Court of Appeals on the interlocutory appeal.

Even assuming that the Solicitor is correct in asserting (Brief at 11) that the Court of Appeals had the power to reach and decide the Spending Clause issue, itself not appealable on an interlocutory basis, as ancillary to the immunity issue appealable under Mitchell v. Forsyth, 472 U.S. 511 (1985), the Spending Clause issue in fact was not presented to the Court.

The Solicitor General relies on cases such as Drake v. Scott, 812 F.2d 395 (8th Cir. 1987) in arguing that there was jurisdiction of the ancillary Spending Clause issue because

it was potentially dispositive of the litigation (Brief at 11). But each of the cases he cites involved ancillary issues that were properly presented through motions to dismiss or for summary judgment at the district court level along with the qualified immunity issue, and then were briefed and argued at the appellate level. See Drake, 812 F.2d at 397. Such was not the case here, where no motion or brief was ever filed on the Spending Clause issue. And while the Solicitor General explains why the Fourth Circuit was free in the abstract to decide an ancillary issue (Brief at 11-12), he nowhere explains why he reads the Fourth Circuit opinion as having decided it, nor does he explain why this Court should wholly ignore two prudential concerns.

The first is the Court's long-standing concern to keep interlocutory review narrow. The Solicitor General's invitation to ignore

in this case the qualified immunity question that is appealable and consider only the "ancillary" issue of damages under Section 1983 that is not appealable standing alone turns this concern and Mitchell v. Forsyth on their heads. It would allow government defendants to appeal a very wide spectrum of adverse rulings on an interlocutory basis if they can wag the cause of action dog by using the qualified immunity tail.

The second rule the Solicitor General asks the Court to ignore is that, ordinarily, this Court will not decide issues that are not raised in the Court of Appeals. Delta Air Lines v. August, 450 U.S. 346,362 (1981); Youakim v. Miller, 425 U.S. 231, 234 (1976); Adickes v. Kress & Co., 398 U.S. 144, 147 n.2 (1970).

Moreover, it is not even clear that the certiorari petition has presented the issue to this Court, despite the Solicitor's effort to

extract and reframe it. The Question Presented itself shows that petitioners still see the central issue as Harlow immunity. The Solicitor himself writes that "two legal questions decided by the court of appeals are arguably raised by the present petition." Brief at 6 (emphasis added). We submit that this Court should not reach out to decide on interlocutory appeal a question which is not itself subject to interlocutory appeal, which was not raised in the courts below and which "arguably" is not raised in the petition for certiorari.

2. This Court also should not review the issue which the Solicitor presents because there is no conflict between courts of appeals. No other circuit court has considered whether a damage remedy is available under Section 1983 in a case involving violations of foster care statutory rights that the court found to state a cause

of action and be enforceable for purposes of injunctive relief. The cases cited by the Solicitor General for a conflict instead are ones in which circuit courts have held that the particular statutory rights alleged to have been violated were not enforceable at all through Section 1983, for any purpose (prospective injunctive or monetary relief), because the alleged rights were not clear or definite enough in the Social Security Act.

The Solicitor General first cites Scrivner v. Andrews, 816 F.2d 261 (6th Cir. 1987), which held that there was no enforceable right under the foster care statute to "meaningful visitation" by a parent to a child in out-of-home care. The court distinguished the asserted right from the very different claims in Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983), which held, as did the courts below in this case, that the foster

care statute's rights to individualized case plans and case reviews are enforceable through Section 1983. Scrivner differs from this case and Lynch because the claim of a right to meaningful visitation is simply a very different substantive claim, not specifically set out in the statute and insufficiently clear to be enforceable under Section 1983.

The Scrivner court also noted in dictum that the circuit had earlier determined that damages were not available in a Section 1983 foster care action, citing Lesher v. Lavrich, 784 F.2d 193 (6th Cir. 1986). The court in Lesher, however, actually had been a much more limited ruling and never reached the issue for which it is cited in Scrivner.

In Lesher, two parents sued for the return to their custody of their two children who had been found neglected and dependent. They claimed there had not been a program of

preventive services to avert the out-of-home placement, as arguably required by the foster care statute. On this basis they asked the federal court to rule that the state court judgment which had deprived them of custody was a nullity and to award consequential damages. The Sixth Circuit denied all forms of relief, holding that the relief sought "nullifying a prior state court judgment of child neglect or dependency, or awarding damages in connection therewith" was not available merely because the state had failed to comply with the federal statute on preremoval services. 784 F.2d at 198. Lesher did not consider, much less determine, whether damages were foreclosed under Section 1983 when violations of foster care law presented claims otherwise cognizable by the federal court. Nor was any Spending Clause argument ever raised.

The Solicitor also cites Harpole v. Arkansas Department of Human Services, 820 F.2d 923 (8th Cir. 1987), to show a conflict. In Harpole, a grandmother claimed her grandson's constitutional rights had been violated when he died from parental neglect after the county social services agency had released him to the custody of his mother.

The Eighth Circuit rejected the Constitutional claims. In the last paragraph of the opinion the court also briefly addressed claims under the Social Security Act -- looking at provisions not involving foster care and which the Solicitor General concedes are different from those in this case (Brief at 15 n.9). The Eighth Circuit simply found that there were no enforceable rights that could provide the basis for a Section 1983 claim at all, and that the plaintiff did not argue that the Social Security Act itself

created a private cause of action. This last point is what the portion of the opinion the Solicitor quotes (Brief at 14) states -- the Social Security Act itself does not create a cause of action for "compensation." As the Solicitor says, the opinion "is not without ambiguity." (Brief at 14). But it is pretty clear that Harpole did not consider, much less decide, whether Spending Clause statutes can form the basis for a damage action under Section 1983 when otherwise enforceable rights have been violated.

In short, there is no case involving foster care statutes, nor, to our knowledge any Spending Clause statute, in which a court of appeals has held that there are enforceable rights under Section 1983 (applying the tests of cases like Middlesex County Sewage Authority, supra), but that relief is limited to an injunction and that Section 1983 can not

form the basis for an action for damages. The Solicitor's asserted conflict consists of ambiguous dicta from two circuits which have not considered that issue.

3. All other considerations aside, it is simply premature for the Court to give plenary review to the issue the Solicitor General presents. At some point in the future that issue may become one of importance, with splits in the circuits and widespread practical application. But the evidence to date suggests that the issue is not troubling the lower courts in any substantial way and that the practical implications are far less than the Solicitor General asserts.

While the Solicitor General suggests that there is "confusion" over the damages question, the circuits are really looking at different substantive portions of the foster care statute (or other Spending Clause

statutes) and finding some substantive claims enforceable and some not, applying the criteria of Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), and Middlesex County Sewage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981). Neither the Solicitor General nor the petitioners has pointed to any case in which a court found injunctive relief available under Section 1983 but found damages unavailable because the underlying violation was of a Spending Clause statute. Perhaps more important, no lower court has given any thorough consideration as to the reasons that might support or caution against ignoring the language of Section 1983 and the presumption that Congress meant to allow reliance on it for a remedy. See Wright v. Roanoke Redevelopment and Hous. Auth., ____ U.S. ____, 107 S.Ct. 766, 771 (1987). There has been no

consideration by any lower court of how the legislative history of Section 1983, the development of Section 1983's case history, or any considerations of policy might affect the question of bifurcating the relief available. This Court would be considering the issue in a virtual vacuum of prior analysis by lower courts.

This vacuum exists even though it has been eighteen years since the Rosado v. Wyman decision, eight since the Maine v. Thiboutot decision and seven years since Pennhurst State School & Hospital v. Halderman. If it were really true that "the issue is one of considerable practical importance" (Brief at 15, 18), one would expect much more case law -- in numbers and depth of analysis -- from the lower courts.

Moreover, Wright v. Roanoke Redevelopment and Housing Authority, ___ U.S. ____, 107

S.Ct. 766 (1987) is the most recent decision by this Court touching on this issue and it establishes that the Section 1983 remedy for violations of statutes enacted pursuant to the Spending Clause includes at least certain forms of monetary relief. While the Solicitor General tries to distinguish damages from a recovery of monies (Brief at 18 n.11), such a distinction may not have validity in this context. See Edelman v. Jordan, 414 U.S. 651 (1974). In any event, the impact of Wright on the matter raised by the Solicitor is one that would benefit from a fuller airing in the lower courts and allowing time for development of the issue.

In short, this is a classic situation in which this Court should not grant plenary review, but rather should await further developments in the lower courts. If more cases percolate up, it will become clearer

whether there is a real conflict in the circuits and what the practical implications are. This Court will then have the benefit of broader and deeper analysis of the issues by the lower courts. But in the instant case this Court is being asked by a non-party to grant plenary review in an interlocutory appeal of an issue not itself appealable on an interlocutory basis, not actually appealed to the Court of Appeals, not clearly encompassed in the Question Presented, and to which the Court of Appeals arguably devoted one sentence of dictum.

For these reasons, respondents respectfully urge this Court to deny the petition for certiorari.

Respectfully submitted,

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